No. 08-368

Supreme Court, U.S.
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In the Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

COMMANDER DANIEL SPAGONE, U.S.N., CONSOLIDATED NAVAL BRIG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF FORMER FEDERAL JUDGES AND FORMER SENIOR JUSTICE DEPARTMENT OFFICIALS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are 14 former federal judges (one of whom was the Director of the FBI), 2 former Attorneys General, and 12 other former senior officials in the United States Department of Justice. Please see the attached Appendix for a list of the *amici*, along with biographical information for each one. *Amici* are interested in this case because of their years of dedicated service to the United States and their commitment to the Constitution and the rule of law. *Amici* are gravely concerned about the Fourth Circuit's decision in this case, which permits the government to seize and indefinitely imprison anyone in this country, citizens and non-citizens alike, without the procedural protections provided in criminal prosecutions.

The Fourth Circuit's decision rests on the premise that the "war on terror" justifies deviation from settled principles of due process, and that the Executive Branch should be permitted to arrest within the United States and to detain indefinitely without charge or trial, anyone—even a legal alien or United States citizen—whom it alleges to be an "enemy combatant." We emphatically reject that premise. Those who plan terrorist acts should be tried and, if guilty as charged, convicted in a court of law. Indeed, in many cases in recent years, the criminal justice system has been used to effectively prosecute people accused of committing or planning

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

to commit acts of terrorism within the United States. Based on their many years of experience, *amici* are knowledgeable about the tools prosecutors possess, the ability of the federal courts to handle cases involving classified evidence, and the effectiveness of the criminal justice system to prosecute alleged terrorists and protect American citizens.

SUMMARY OF ARGUMENT

In this extraordinary case, the Fourth Circuit has held that the government has the power to arrest and imprison indefinitely anyone in the United States — including American citizens — whom the government suspects of being a potential terrorist, without the normal procedural protections found in the criminal justice system. This unprecedented expansion of Executive authority within the borders of the United States is not only at odds with more than 200 years of history, but it is wholly unnecessary. The United States criminal justice system is well equipped to prosecute and imprison people who plan or commit terrorist acts; in recent years, the United States has successfully prosecuted many terrorists in the federal courts. In addition, the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3 §§ 1-16, and the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1801 et seq., provide effective tools that courts have used to handle terrorism prosecutions and the foreign intelligence and classified information often present in such cases.

It is essential that this Court reverse the Fourth Circuit's decision, which permits the government to forgo the criminal process and instead implement a regime of indefinite Executive detention. As long as that ruling stands, it will be a grave threat to the

civil liberties of American citizens, an omnipresent cudgel that may be wielded by the Executive Branch at its discretion against anyone suspected of posing a potential threat.

ARGUMENT

THE CRIMINAL JUSTICE SYSTEM IS WELL EQUIPPED TO PROSECUTE PEOPLE ACCUSED OF PLANNING OR COMMITTING TERRORIST ACTS.

This case raises fundamental issues concerning the power of the Executive Branch. The Fourth Circuit has held that the government has the power to arrest and imprison indefinitely anyone in the United States whom the government suspects of being a potential terrorist, without the normal procedural protections found in the criminal justice system. (In this case, for example, al-Marri was held *incommunicado* for 16 months without access to his attorneys after the government dismissed the criminal charges against him and decided to detain him as an "enemy combatant" instead. Pet. 4.) Moreover, the unprecedented power granted to the government by the Fourth Circuit's decision applies not only to non-citizens seized in this country, but to American citizens as well. We are gravely concerned that the Fourth Circuit's decision gives the government unfettered discretion to avoid criminal prosecutions and the protections associated with them, such as the defendant's right to counsel, the right to hear all of the evidence offered against him, the right to confront witnesses, and the government's obligation to prove guilt beyond a reasonable doubt.

Moreover, we are concerned with the appearance in this case that the government may have subjected

al-Marri to indefinite military detention in order to interrogate him outside the "strictures of criminal process." Pet. App. 54a n.19 (Motz, J., concurring in the judgment) ("The Government's recent admission in other litigation that it has subjected al-Marri to repeated interrogation during his imprisonment in the Naval Brig would seem to substantiate al-Marri's contention" that he is being detained indefinitely for interrogation outside the criminal justice system). As Justice O'Connor wrote for the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004), "indefinite detention for the purpose of interrogation is not authorized." See also *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) (executive detention is not "justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure . . . . For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny").

The Fourth Circuit's decision is especially troubling because the animating force underlying it—the notion that indefinite executive detention is the only means of preventing alleged terrorist activity—is demonstrably false. Congress has enacted a wide variety of statutes that may be used to effectively prosecute suspected terrorists. See, *e.g.*, 18 U.S.C. § 2384 (conspiring to overthrow, make war or oppose by force the government of the United States); 18 U.S.C. § 2339A (criminalizing the provision of "material support or resources" to terrorist organizations for carrying out a number of specified offenses, including murder, kidnapping and the violation of various anti-terrorism statutes); 18 U.S.C. § 2339B (criminalizing knowingly providing

material support for foreign terrorist organizations, but not requiring intent that the support be used in furtherance of terrorist activity); 18 U.S.C. § 2339C (prohibiting conduct that "directly or indirectly" provides funds with the knowledge that the funds will be used to carry out terrorist activities); 18 U.S.C. § 2339D (making it a crime to receive military-type training from an organization that the Secretary of State has designated a foreign terrorist organization); 18 U.S.C. § 2332b (criminalizing "acts of terrorism transcending national boundaries").[2] As discussed in Section D *infra*, there are also a variety of other federal statutes that the government has used to prosecute and imprison persons suspected of terrorist-related activity.

In addition, CIPA and FISA provide effective tools for the investigation and prosecution of those suspected of planning or committing terrorist acts. FISA allows the government to lawfully conduct electronic surveillance and physical searches to gather foreign intelligence. CIPA establishes procedures to handle classified information that might be used during a criminal trial.

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[2] For defendants charged with terrorism-related offenses, there is a statutory presumption that the defendant will be detained before trial. 18 U.S.C. § 3142. To overcome that presumption, defendants must show that they do not pose a risk to the community or a flight risk. Order of Detention, *United States v. al-Moayad*, No. 03-cr-01322 (E.D.N.Y. Nov. 17, 2003) (Dkt. No. 6), *cited in* Richard B. Zabel & James J. Benjamin, Jr., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS 85 (May 2008). For example, in the Embassy bombing cases, defendant El-Hage was detained thirty-three months before his trial. *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000).

A. The Criminal Justice System Has Repeatedly Proven Its Effectiveness In Prosecuting Alleged Terrorists.

The criminal justice system has repeatedly demonstrated its ability to prosecute terrorism crimes, including the following cases:

1. In a series of related cases, 17 individuals were convicted of planning and executing the 1993 bombing of the World Trade Center, conspiring to bomb United States commercial airliners in Southeast Asia, and engaging in a seditious conspiracy "to wage a war of urban terrorism against the United States and forcibly to oppose its authority." *United States v. Rahman*, 189 F.3d 88, 104 (2d Cir. 1999); see also *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998) (all affirming convictions). Among the offenses for which the *Rahman* defendants were convicted were seditious conspiracy, attempted bombing, a variety of firearms charges, and several counts of murder, attempted murder and conspiracy to commit murder (including the attempted murder of Egyptian President Hosni Mubarak and the murder of Rabbi Meir Kahane). *Rahman*, 189 F.3d at 104.

2. Iyman Faris was charged with, and ultimately pleaded guilty to, conspiring with other members of al Qaeda to destroy the Brooklyn Bridge. *United States v. Faris*, 162 F. App'x 199 (4th Cir. 2005) (affirming Faris's conviction and 20-year sentence).

3. Seven young men dubbed the "Portland Seven" were apprehended in 2002 and charged with various counts of conspiracy; one fled the country for Afghanistan, where he was killed in battle, while the

other six pleaded guilty and received prison sentences. Mitch Frank, *Terror Goes on Trial*, TIME, Mar. 7, 2005, at 34; Jack Epstein & Johnny Miller, *The Record in Court of U.S. Charges Brought Against Terrorism Suspects by the Justice Department*, S.F. CHRONICLE, Sept. 17, 2004, at A3.

4. Six men from New York State who came to be known as "The Lackawanna Six" were charged with providing material assistance to a terrorist organization after they traveled to Afghanistan to train at an Al Qaeda training camp where they met with Osama bin Laden. All six defendants entered guilty pleas and were sentenced to prison terms. John J. Goldman, *First "Lackawanna Six" Sentencing*, L.A. TIMES, Dec. 4, 2003, at A20; John J. Goldman, *Last of the "Lackawanna Six" Terror Defendants Sentenced*, L.A. TIMES, Dec. 18, 2003, at A38.

5. On December 22, 2001, Richard Reid was arrested for trying to destroy an airplane with explosives embedded in his shoes. He later pleaded guilty to various terrorism-related offenses including: attempted use of a weapon of mass destruction, 18 U.S.C. § 2332a(a)(1); placing an explosive device on board an aircraft and interfering with an airline flight crew and attendants, 49 U.S.C. § 46504; and attempted destruction of an aircraft, 18 U.S.C. § 32(a). *United States v. Reid*, 369 F.3d 619, 619 n.1 (1st Cir. 2004). He was sentenced to life in prison. *Id.* at 619-620.

6. United States citizen John Walker Lindh was apprehended in Afghanistan and ultimately pleaded guilty to charges that included assisting al Qaeda and carrying explosive devices. He received a 20-

year sentence. *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002).

7. In 2006, the government indicted seven suspected terrorists, including the group's leader, Narseal Batiste, who were arrested in Florida for allegedly plotting to destroy the Sears Tower. *United States v. Batiste*, 2007 U.S. Dist. Lexis 61186 (S.D. Fla. Aug. 21, 2007). They have been charged with violating 18 U.S.C. §§ 2339B (providing material support to terrorists), 2339A (providing material support or resources to designated foreign terrorist organizations), 844(n) (conspiracy to import, manufacture, distribute and store explosive materials), and 2384 (treason, sedition and subversive activities). *Id.* One of the defendants was acquitted and now faces deportation to Haiti. Luis F. Perez, *Cleared Man May Be Deported*, SUN-SENTINEL, Aug. 25, 2008, at 6B. A third trial is set for the remaining defendants after two mistrials. Vanessa Blum, *Third Liberty City Trial Set for January; New Lawyers Get Time To Prepare*, SUN-SENTINEL, May 1, 2008, at 2B. As of the time of this filing, jury selection had begun. *Jury selection begins in Florida terror retrial*, ASSOCIATED PRESS, Jan. 27, 2009.

8. Ahmed Omar Abu Ali was arrested in Saudi Arabia and transferred to the United States, where he was prosecuted for joining al Qaeda and participating in plans to commit terrorist acts within the United States. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 341 (E.D. Va. 2005). He was sentenced to 30 years' imprisonment after being convicted of nine counts, including providing material support and resources to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B,

conspiracy to provide material support to terrorists in violation of 18 U.S.C. § 2339A, and receiving funds and services from al Qaeda in violation of 50 U.S.C. § 1705(b). *United States v. Abu Ali*, 2006 U.S. Dist. Lexis 29461, at *2 n.1, *20 (E.D. Va. Apr. 17, 2006). The Fourth Circuit recently affirmed his conviction and remanded to the district court for resentencing on the ground that the district court's significant downward departure from the sentencing guidelines was unjustified. *United States v. Abu Ali*, 528 F.3d 210, 269 (4th Cir. 2008), petition for cert. filed (Oct. 6, 2008) (No. 08-464).

9. Ali al-Timimi, an Islamic scholar and alleged member of the Virginia Jihad network, who encouraged young men to travel to foreign training camps and join the Taliban to fight the United States, was sentenced to life in prison after a jury convicted him of conspiracy, attempting to aid the Taliban, soliciting treason, soliciting others to wage war against the United States, and aiding and abetting the use of firearms and explosives. Eric Lichtblau, *Scholar Is Given Life Sentence in 'Virginia Jihad' Case*, N.Y. TIMES, July 14, 2005, at A21.

10. Rafiq Sabir, a doctor living in Florida, and Tarik Shah were charged with conspiring to provide martial arts training and medical assistance to al-Qaeda in violation of 18 U.S.C. § 2339B. Sabir was convicted and sentenced to 25 years in prison following a five-week jury trial. *United States v. Sabir*, 2007 U.S. Dist. Lexis 77952 (S.D.N.Y. Oct. 15, 2007). Shah pleaded guilty to all charges and was sentenced to 15 years in prison on November 7, 2007. Press Release, U.S. Atty's Office S.D.N.Y., Bronx Martial Arts Instructor Sentenced to 15 Years in

Prison for Conspiring to Provide Material Support to Al-Qaeda (Nov. 7, 2007).

11. Al-Qaeda member Christopher Paul met repeatedly with terrorist leaders in Pakistan and Afghanistan over the course of 15 years and received weapons training from them. *United States v. Paul*, No. 2:07-cr-00087-GLF (S.D. Ohio June 6, 2008). The Ohio resident pleaded guilty in June 2008 to conspiracy to use weapons of mass destruction against European and United States targets, and was sentenced to 20 years in prison. *Id.*

12. Yassin Aref and Mohammed Hossain, two Albany mosque leaders, were convicted of a money laundering conspiracy to provide material support to a terrorist organization in a case involving a scheme to use a missile in an attack on New York City. The Second Circuit recently affirmed their convictions and held that the district court properly sealed certain classified documents in their trials. *United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008), petitions for cert. filed (Dec. 8, 2008) (Nos. 08-7650, 08-7651).

13. In March 2008, a jury found a former member of the United States Navy, Hassan Abu-Jihaad, guilty of providing material support to terrorists and disclosing classified national defense information as part of a conspiracy to kill United States citizens. Press Release, U.S. Atty's Office D. Conn., Jury Finds Former Member of U.S. Navy Guilty of Terrorism and Espionage Charges (Mar. 5, 2008).

14. On November 24, 2008, the Second Circuit affirmed the convictions of Mohamed Sadeek Odeh, Mohamed Rashed Daoud Al-'Owhali, and Wadih El-

Hage for their involvement in the 1998 bombings of the American embassies in Kenya and Tanzania. *United States v. Odeh*, 548 F.3d 276 (2d Cir. 2008). In doing so, the court held that the district court's reliance on CIPA to restrict access to classified information to individuals with security clearance did not violate El-Hage's constitutional rights. *Id.*

15. On December 22, 2008, a jury convicted five defendants for conspiracy to kill U.S. soldiers at Fort Dix in a jihadist plot. Paul von Zielbauer, *5 Men Are Convicted in Plot on Fort Dix*, N.Y. TIMES, Dec. 22, 2008. The defendants potentially face life imprisonment.

16. Ahmed Abdellatif Sherif Mohamed received a 15-year sentence after pleading guilty to providing material support to a terrorist organization in violation of 18 U.S.C. § 2339A for possessing bomb making material and posting an instruction video on remote bomb detonation on YouTube. Mitch Stacy, *Egyptian student gets 15 years in Fla. terror case*, ASSOCIATED PRESS, Dec. 18, 2008; see also Dep't of Justice Press Release, *available at* http://www.usdoj.gov/opa/pr/2008/December/08-nsd-1127.html.

17. Uzair Paracha was sentenced to 30 years' imprisonment after being convicted of various terrorism-related charges for trying to obtain immigration documents for an al Qaeda member and safeguarding al Qaeda assets. *United States v. Paracha*, 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006), *aff'd*, 2008 WL 2477392 (2d Cir. June 19, 2008).

B. CIPA Equips Courts To Effectively Manage Classified Material In Terrorism Prosecutions.

The Classified Information Procedures Act is an important statutory tool that provides sound procedures for courts to effectively manage classified information at issue in terrorism prosecutions. The criminal justice system's record of effectively handling classified information without security breaches reinforces the conclusion that our criminal justice system is more than able to deal with terrorism prosecutions.

CIPA contains the following central features:

- The government may seek a protective order to prevent disclosure of classified information provided to a defendant in a trial. 18 U.S.C. app. 3 § 3.
- The defendant must provide the court and government with written notice that he intends to use classified information. 18 U.S.C. app. 3 § 5.
- The court is authorized to determine the relevance and admissibility of all classified information, including any classified information requested by the defendant. 18 U.S.C. app. 3 §§ 4 & 6(a). The government may request a hearing for the court to make such a determination; that hearing may be held *in camera* upon a proper showing that a public hearing would disclose the classified information. *Id.* § 6(a).
- The statute also provides alternative procedures the court may use for addressing

classified information where the court authorizes its disclosure, such as redacting classified portions of documents or allowing for a substitution such as a statement admitting the relevant facts or a summary of the classified information. 18 U.S.C. app. 3 § 6(c)(1). In response to a court's decision to authorize disclosure of classified information (or its substitute), the Attorney General may submit an affidavit "certifying that disclosure of classified information would cause identifiable damage to the national security of the United States. If so requested by the United States, the court shall examine such affidavit *in camera* and *ex parte*." *Id.* § 6(c)(2). The court may also seal or close the proceedings. *Id.* § 6(d) & (f).

- CIPA provides for immediate appeal of the district court's decisions regarding the admission or exclusion of classified information. 18 U.S.C. app. 3 § 7.

- Section 8 provides procedures to deal with classified information at trial, such as admitting only a portion of documents or evidence and taking further precautions with the witnesses' testimony to avoid disclosure of classified information. 18 U.S.C. app. 3 § 8.

CIPA has been an effective tool in terrorism prosecutions. It enables courts to protect national security interests, while at the same time establishing fair procedures that permit the prosecution of persons accused of planning or committing terrorist acts. Judges with CIPA experience "speak of it as a reasonable compromise

between fairness and security." Kenneth Roth, *After Guantanamo: The Case Against Preventative Detention*, FOREIGN AFFAIRS, May/June 2008, at 9. Judge Coughenour, who presided over the Millennium Bomber trial in 2001, noted that CIPA "played a prominent role during the trial," and that "the act's extensive protections [were] more than adequate." John C. Coughenour, *The Right Place to Try Terrorism Cases*, WASH. POST, July 27, 2008, at B7. Indeed, a recent study concludes that "CIPA has provided a flexible, practical mechanism for problems posed by classified evidence," citing at least eighteen terrorism cases where CIPA has been employed successfully. Richard B. Zabel & James J. Benjamin, Jr., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS 85 (May 2008). See also, *e.g.*, *Abu Ali*, 528 F.3d at 250-255 (affirming convictions for terrorism-related offenses and explaining in detail how the district court "appropriately balanced" the interests of the government in protecting national security interests and the defendant's right to a fair trial).[3]

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[3] In his opinion below, Judge Wilkinson cited two instances of alleged disclosures to support his view that our criminal justice system is not up to the task of prosecuting those accused of terrorism without creating a dangerous security risk. Pet. App. 214a-219a (Wilkinson, J., concurring in part, dissenting in part) (citing Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15). First, Judge Wilkinson referenced the prosecution of Omar Adel Rahman, in which the government's list of unindicted co-conspirators was turned over to the defendant and reportedly reached Osama bin Laden in Khartoum shortly thereafter; second, Judge Wilkinson referred to testimony given during the trial of Ramzi Yousef, the mastermind of the 1993 World

Indeed, Patrick Fitzgerald, the prosecutor in the case arising out of the bombings of the American embassies in Tanzania and Kenya, has commented that "[w]hen you see how much classified information was involved in that case, and when you see that there weren't any leaks, you get pretty darn confident that the federal courts are capable of handling these prosecutions. I don't think people realize how well our system can work in protecting classified information." SERRIN TURNER & STEPHEN J. SCHULHOFER, THE SECRECY PROBLEM IN TERRORISM TRIALS 25 (Brennan Ctr. For Justice 2005) (quoting a November 29, 2004 consultation with Patrick Fitzgerald).

Trade Center bombings, that allegedly helped terrorists discover that one of their communications links had been compromised.

In both cases, however, the government apparently did *not* invoke CIPA to limit access to the evidence. IN PURSUIT OF JUSTICE, at 88-89. With respect to the list of co-conspirators in Rahman's trial, the government evidently did not invoke CIPA to prevent disclosure of the list; in other cases since then, including the Embassy Bombings case, the government *has* successfully invoked CIPA to prevent disclosure of sensitive information. *Id.* at 88 (citing the protective order issued in *United States v. El-Hage*, No. 98-cr-001023 (S.D.N.Y. Dec. 17, 1998) (Dkt. 27)). With respect to the second example, publicly available information cannot confirm the incident, but again the trial record does not indicate that the government invoked CIPA to prevent disclosure of the testimony that Judge Wilkinson referenced. *Id.* at 88. Far from illustrating the inadequacies of CIPA, these examples highlight the importance of invoking the statute's protections more fully.

C. Evidence The Government Obtains Through FISA Surveillance May Be Admitted Without Compromising Sensitive Information.

The admissibility of evidence obtained through surveillance under the Foreign Intelligence Surveillance Act, and the Executive's ability to introduce surveillance-derived evidence without compromising its sources and methods, have further enhanced the government's ability to successfully prosecute suspected terrorists in the criminal justice system.

FISA was originally enacted in 1978 to permit the government to conduct lawful electronic searches for the purpose of gathering foreign intelligence within the United States without satisfying the Fourth Amendment's criminal probable cause requirements. IN PURSUIT OF JUSTICE, at 77. [4] Under the 1978 statutory scheme, the government had to show that the "primary purpose" of the interception was for obtaining foreign intelligence. 50 U.S.C. § 1804. In 2001, Congress amended FISA in the USA Patriot Act, Pub. L. 107-56, § 1004, 115 Stat. 272 (2001), making it easier for the government to meet its burden to obtain FISA surveillance and to use information discovered in that surveillance in

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[4] Congress amended FISA in 1994 to expand its reach to physical searches. Intelligence Authorization Act for Fiscal Year 1995, Pub. L. No. 103-359, 108 Stat. 3443 (1994). In 1998, Congress amended the statute to create modified procedures for obtaining pen registers and to authorize the Executive Branch to access business records for foreign intelligence and international terrorism investigations. See 50 U.S.C. §§ 1861-1862.

criminal prosecutions. For example, the Patriot Act changed the government's burden from having to show that the "primary purpose" was to obtain international intelligence to show only that "a significant purpose" of the interception was to obtain international intelligence. 50 U.S.C. § 1804(a)(6)(B). In addition, Congress explicitly allowed federal officers who obtained foreign intelligence information to "consult with Federal law enforcement officers to coordinate efforts to investigate or protect against" attack or other acts of terrorism. 50 U.S.C. § 1806(k)(1).

Moreover, FISA allows the special Foreign Intelligence Surveillance Court ("FISC"), which meets *ex parte* and in secret, to authorize electronic surveillance and physical searches.[5] A FISA order is based on probable cause that the target is a foreign power or an agent of a foreign power. 50 U.S.C. § 1805(a).

Material obtained under FISA may be admitted in criminal trials. See *United States v. Wen*, 477 F.3d 896, 897 (7th Cir. 2006) (Easterbrook, J.) (citing *In re Sealed Case*, 310 F.3d 717 (F.I.S. Ct. Rev. 2002)). As the FISA review court explained in *In re Sealed Case*, "Congress did not impose any restrictions on the government's use of the foreign intelligence information to prosecute agents of foreign powers for foreign intelligence crimes." 310

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[5] The Justice Department submitted 2,181 FISA applications in 2006—double the number submitted in 2001. Of those applications, the FISC rejected only one. See IN PURSUIT OF JUSTICE, at 81 (citing Letter from Richard A. Hertling, Acting Assistant Att'y Gen., to Hon. Nancy Pelosi (Apr. 27, 2007)).

F.3d at 725. Thus, the government is able to use FISA evidence in terrorism prosecutions. See, *e.g.*, *United States v. Holy Land Found. for Relief & Dev.*, 2007 U.S. Dist. LEXIS 50239, at *12-13, *26 (N.D. Tex. July 11, 2007) (denying defendants' motions to compel production of the FISA application and to suppress non-privileged evidence obtained from the FISA surveillance); *United States v. Holy Land Found. for Relief & Dev.*, 2007 U.S. Dist. LEXIS 48616, at *8-9 (N.D. Tex. July 5, 2007) (denying defendants' motion to declassify all communications obtained via FISA); *United States v. Paul*, No. 07-cr-00087 (S.D. Ohio Apr. 23, 2007) (Dkt. 19) (government's notice that it would use evidence obtained through electronic and physical FISA surveillances; the defendant pleaded guilty in June 2008, see Dkt. 59 & 60); *United States v. al-Arian*, 267 F. Supp. 2d 1258, 1260 (M.D. Fla. 2003) (trial evidence was to include 21,000 hours of telephone recordings in Arabic obtained under FISA; defendant later pleaded guilty). Moreover, 50 U.S.C. § 1806(f) provides that FISA materials, in specified circumstances, shall be reviewed by the court *ex parte* and *in camera* to determine whether the FISA surveillance was lawfully authorized and conducted.

D. The Government Possesses Other Lawful Means By Which It Also May Prosecute And Imprison Persons Suspected Of Terrorism.

In addition to statutes aimed specifically at terrorist-related activity, the government has a variety of other lawful means by which it may prosecute and imprison suspected terrorists and thus thwart terrorist activity in its nascent stages.

For example, the Department of Justice has prosecuted suspected terrorists for fraudulently obtaining travel documents (18 U.S.C. § 1546); for immigration violations (18 U.S.C. § 1425); for making misrepresentations to federal investigators (18 U.S.C. § 1001); and for use of a false social security number (42 U.S.C. § 408(a)(7)(B)). See U.S. Dep't of Justice, *2006 Counterterrorism White Paper*, at 29-30, *available at* http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf; see also IN PURSUIT OF JUSTICE, at 51-54; Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 430-433 (2007). The government has also prosecuted suspected terrorists under the criminal solicitation statute, 18 U.S.C. § 373, see, *e.g.*, *Rahman*, 189 F.3d at 125-126, as well as for other garden variety crimes such as fraud, money laundering or illegal possession of firearms.

Indeed, the government originally employed this strategy with al-Marri, charging him with various criminal violations, including credit card fraud, making false statements to the FBI, and identity theft. Pet. Br. 3. Had al-Marri been convicted on all counts, he could have been sentenced for up to 30 years' imprisonment under federal sentencing guidelines because of the enhancements for terrorist-related activity. See U.S.S.G. § 3A1.4.[6] See also *id.* n.2.

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[6] Section 3A1.4 of the federal sentencing guidelines provides for an increased sentence for defendants charged with a felony "that involved, or was intended to promote, a federal crime of terrorism."

The government also used this strategy against Zacarias Moussaoui. The government originally arrested Moussaoui on immigration charges for overstaying his visa when he raised suspicions at the flight school he attended. He ultimately pleaded guilty to conspiracy charges related to the September 11 attacks on the World Trade Center and was sentenced to life. Judgment, *United States v. Moussaoui*, No. 01-cr-00455 (E.D. Va. May 4, 2006).

The government also has the authority to detain individuals during pending deportation proceedings. 8 U.S.C. § 1225(a) (authorizing the Attorney General to issue warrants for the arrest and detention of any alien pending a removal decision). Indeed, detention is mandatory when the alien is reasonably believed to be engaged in terrorist activity. 8 U.S.C. § 1226a(a)(3); see also *Demore v. Kim*, 538 U.S. 510, 513 (2003) (holding that mandatory detention under the Immigration Act does not violate the Due Process Clause). And once an order for removal has been entered, the government is authorized to detain the alien for a reasonable period necessary to secure removal. 8 U.S.C. § 1231(a)(1); *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

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Judge Coughenour recently wrote that "[a]s constituted, U.S. courts are not only an adequate venue for trying terrorism suspects but are also a tremendous asset in combating terrorism." *The Right Place to Try Terrorism Cases*, WASH. POST, July 27, 2008, at B7. We wholeheartedly agree. The cases and statutes we have discussed demonstrate that the existing criminal justice system is more than up to the task of prosecuting and bringing to justice those who plan or attempt terrorist acts

within the United States—without sacrificing any of the rights and protections that have been the hallmarks of the American legal system for more than 200 years. But unless the Fourth Circuit's decision is overturned, the potential for indefinite Executive detention will threaten the civil liberties of everyone in this Nation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

AMICI INFORMATION

The *amici curiae* are as follows:

Judge William G. Bassler served on the United States District Court for the District of New Jersey from 1991 to 2006 and on the Superior Court for the State of New Jersey from 1988 to 1991.

Robert C. Bundy was United States Attorney for the District of Alaska from 1994 to 2001. He is currently Of Counsel to Dorsey & Whitney LLP in Anchorage.

A. Bates Butler III was United States Attorney for the District of Arizona from 1980 to 1981 and First Assistant United States Attorney for the District of Arizona from 1977 to 1980.

Judge Edward N. Cahn served on the United States District Court for the Eastern District of Pennsylvania from 1974 to 1998 and served as Chief Judge from 1993 to 1998. Judge Cahn is currently Of Counsel to Blank Rome LLP.

W. Thomas Dillard was United States Attorney for the Eastern District of Tennessee in 1981 and the Northern District of Florida from 1983 through 1986. He is currently a partner at Ritchie, Dillard & Davies, P.C. in Knoxville.

Edward L. Dowd, Jr. was United States Attorney for the Eastern District of Missouri from 1993 to 1999 and the Deputy Special Counsel for the Waco Investigation under Special Counsel from 1999 to 2000. He is currently a partner at Dowd Bennett LLP in St. Louis.

Judge Susan Getzendanner served on the United States District Court for the Northern District of

Illinois from 1980 to 1987. From 1987 to 1991, she was a partner at Skadden, Arps, Slate, Meagher & Flom. Prior to serving on the federal judiciary, she was an associate and partner at Mayer Brown LLP. Since 1991, Judge Getzendanner has worked as an arbitrator.

Judge Shirley M. Hufstedler served on the United States Court of Appeals for the Ninth Circuit from 1968 to 1979. Judge Hufstedler also served as Associate Justice for the California Court of Appeals from 1966 to 1968, and as a judge on the Los Angeles County Superior Court from 1961 to 1966. In addition, she served as United States Secretary of Education from 1979 to 1981.

Judge Nathaniel R. Jones served on the United States Court of Appeals for the Sixth Circuit from 1979 to 2002 and as Assistant United States Attorney for the Northern District of Ohio. He is currently Of Counsel at Blank Rome LLP in Cincinnati, Ohio.

William A. Kimbrough was United States Attorney for the Southern District of Alabama from 1977 to 1981.

Nicholas deB. Katzenbach served as Attorney General of the United States from 1965 to 1966, Deputy Attorney General from 1962 to 1965, and Assistant Attorney General from 1961 to 1962.

Philip Allen Lacovara was Deputy Solicitor General of the United States in charge of criminal and internal security cases before the Supreme Court from 1972 to 1973, and Counsel to the Special Prosecutor, Watergate Special Prosecution Force, from 1973 to 1974. He is now senior counsel at Mayer Brown LLP in New York City.

Judge Thomas D. Lambros served on the United States District Court for the Northern District of Ohio from 1967 to 1995 and served as Chief Judge from 1990 to 1995. Judge Lambros also served as Judge of the Ohio Court of Common Pleas from 1961 until 1967.

Judge George N. Leighton served on the United States District Court for the Northern District of Illinois from 1976 to 1987. He served as Justice of the Illinois Appellate Court from 1969 to 1976 and as Judge on the Circuit Court of Cook County, Illinois from 1964 to 1969. Judge Leighton is a Senior Counselor of the Illinois Bar Association. Since retiring from the federal judiciary, Judge Leighton has been Of Counsel with the Chicago firm, Neal and Leroy, LLC.

Judge Timothy K. Lewis served on the United States Court of Appeals for the Third Circuit from 1992 to 1999 and on the United States District Court for the Western District of Pennsylvania from 1991 to 1992. He is a former Assistant United States Attorney for the Western District of Pennsylvania and Assistant District Attorney for Allegheny County, Pennsylvania.

David L. Lillehaug was the United States Attorney for the District of Minnesota from 1994 to 1998. He is currently an officer and shareholder at Fredrikson & Byron, P.A. in Minneapolis.

Kenneth J. Mighell was United States Attorney for the Northern District of Texas from 1977 to 1981 and Assistant United States Attorney for 16 years. He is currently Of Counsel to Cowles & Thompson in Dallas.

Judge Abner J. Mikva served on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1995, and served as Chief Judge from 1991 to 1994. He served as White House Counsel from 1994 to 1995. He served Illinois as a member of the United States House of Representatives from 1969 to 1973 and from 1975 to 1979. He was an Illinois State Representative from 1956 to 1966. He was a visiting professor at the University of Chicago from 1996 until 2008.

Judge Stephen M. Orlofsky served on the United States District Court for the District of New Jersey from 1995 to 2003 and was Magistrate Judge from 1976 to 1980. He is currently a partner at Blank Rome LLP.

H. James Pickerstein was Court Appointed United States Attorney for the District of Connecticut from 1973 to 1974 and Chief Assistant United States Attorney for the District of Connecticut from 1974 to 1986. He is currently a partner at Pepe & Hazard LLP in Connecticut.

Janet Reno served as Attorney General of the United States from 1993 to 2001. She was the State Attorney of the Eleventh Judicial District of Florida from 1978 to 1993.

Richard A. Rossman was United States Attorney for the Eastern District of Michigan from 1980 to 1981 and Chief of Staff for the Criminal Division of the United States Department of Justice from 1998 to 1999.

Judge H. Lee Sarokin served on the United States Court of Appeals for the Third Circuit from 1994 to 1996 and served on the United States

District Court for the District of New Jersey from 1979 to 1994.

Judge William S. Sessions was Director of the Federal Bureau of Investigation from 1987 to 1993. He served on the United States District Court for the Western District of Texas from 1974 to 1987, and served as Chief Judge from 1980 to 1987. He was United States Attorney for the Western District of Texas from 1971 to 1974. He is currently a partner at Holland & Knight LLP.

Thomas P. Sullivan was United States Attorney for the Northern District of Illinois from 1977 to 1981. He is currently a partner at Jenner & Block LLP in Chicago.

Judge Patricia M. Wald served on the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1999, and served as Chief Judge from 1986 to 1991. She was the United States Judge to the International Criminal Tribunal for the Former Yugoslavia from 1999 to 2001.

Francis M. Wikstrom was United States Attorney for the District of Utah in 1981. He is currently an attorney at Parsons Behle & Latimer in Salt Lake City, Utah.

Judge Alfred M. Wolin served on the United States District Court for the District of New Jersey from 1987 to 2004. He was Presiding Judge for the Superior Court of New Jersey Criminal Division from 1983 to 1987, and a judge on the Superior Court of New Jersey, Civil Division, from 1982 to 1983.